

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

CASE NO. 04-10258NG

ARTHUR PERNOKAS AND  
DIANNE PERNOKAS,  
Plaintiffs

VS.

BARRIE PASTER, M.D.,  
DefendantDEFENDANT'S MOTION TO  
EXCLUDE EVIDENCE OR  
TESTIMONY OF "LOST CHANCE"  
DAMAGES

The Defendant, Barrie Paster, M.D., moves to exclude evidence or testimony of "lost chance" damages in this case. The plaintiffs' case concerns allegations that Dr. Paster failed to diagnose Arthur Pernokas's colon cancer, and that the delay in diagnosis caused him to undergo surgery and chemotherapy. The plaintiffs' expert witnesses have expressed opinions indicating that the plaintiffs intend to seek damages based upon Mr. Pernokas's increased chance of recurrent cancer, and therefore his reduced chance for survival, due to the claims of delayed diagnosis. As discussed more fully in the Memorandum in Support of this Motion, there is no recognized cause of action in Massachusetts for damages based upon such a "lost chance" theory. Furthermore, even if such an action were recognized, the plaintiffs' expert reports have not provided sufficient opinions to support such a theory, and any references to such "lost chance" are speculative, conclusory, and not supported by statements of the "basis and reasons" supporting the opinions, as required under Fed.R.Civ.P. 26(a)(2)(B).

For the foregoing reasons, and those stated in the Memorandum in Support, Defendant Barrie Paster, M.D., respectfully requests that this Court exclude evidence or testimony of the plaintiffs' "lost chance" damages.

REQUEST FOR ORAL ARGUMENT

The defendant requests oral argument on this motion, unless the Court sees fit to allow the defendant's motion without hearing.

/s/ Anthony R. Brighton  
Charles P. Reidy, III  
B.B.O. No. 415720  
Anthony R. Brighton  
B.B.O. No. 660193  
Attorney for Defendant, Barrie Paster, M.D.  
Martin, Magnuson, McCarthy & Kenney  
101 Merrimac Street  
Boston, MA 02114  
(617) 227-3240

CERTIFICATION OF COUNSEL

I, Anthony Brighton, one of the attorneys for defendant Barrie Paster, M.D., certify that I have conferred with plaintiffs' counsel, Rob Gabler, in an attempt to resolve or narrow the issues raised in this motion.

/s/ Anthony R. Brighton  
Charles P. Reidy, III  
B.B.O. No. 415720  
Anthony R. Brighton  
B.B.O. No. 660193  
Attorney for Defendant, Barrie Paster, M.D.  
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101 Merrimac Street  
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CERTIFICATE OF SERVICE

I, Anthony R. Brighton, attorney for defendant, Barrie Paster, M.D., hereby certify that on the 18th day of May, 2006, a copy of the above document was sent by mail, postage prepaid to Robert C. Gabler, Esquire, 100 Summer Street, Suite 3232, Boston, MA 02110.

/s/ Anthony R. Brighton

Charles P. Reidy, III

B.B.O. No. 415720

Anthony R. Brighton

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Attorney for Defendant, Barrie Paster, M.D.

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